

President's report

Anna Katzmann SC



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Standing up for rights

Last year in these pages I referred to the furore over the World Youth Day Regulation, part of which the Federal Court held could have a 'chilling' effect on the exercise of the right of free speech. Noting the absence of human rights legislation in New South Wales or nationally, one did not need to be a soothsayer to predict that more legislation of this kind would follow.

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This year (without public consultation) the New South Wales Parliament passed the Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Bill, legalising the use of covert search warrants in the investigation of numerous criminal offences. It was trumpeted as 'part of the State Government's ongoing commitment to providing law enforcement agencies with the necessary armoury to respond effectively to major crime and keep the community safe'.¹

The Legislative Review Committee expressed concerns about the absence of 'robust consultation' on the Bill and reported that:

the broad covert search warrant powers significantly trespass on personal rights and liberties, particularly in regard to persons not suspected of serious criminal activity. The Committee also believes that the Act contains insufficient safeguards to address these.²

The legislation provides NSW police with extraordinary powers to invade our privacy without our knowledge. The powers enable the police to enter the premises, not merely of suspects, but also of their hapless neighbours, and search and seize items without notice and using a subterfuge. What is more, the householder may not know that the search has been conducted for a period of up to three years afterwards. Until this legislation, powers of this kind were only exercisable in terrorism cases and then only by the NSW Police Counter-Terrorism Co-ordination Command and units of the NSW Crime Commission involved in terrorism-related investigations. Now they apply to all law-abiding citizens, cover a

wide range of indictable offences and may be used by ordinary police officers. As I said at the time the Bill was introduced into the parliament, it is difficult to see any justification for the conferral of such extraordinary powers in a liberal democracy. Certainly, no good reason has been offered. Having regard to the breadth of the powers it was particularly disappointing that the government chose not to consult on the proposed changes.

The Bar Association briefed members of parliament about the implications of the proposals. Despite our view that there was

no place for legislation of this kind, but alive to the political realities, we suggested a number of amendments designed to ameliorate some of the worst features of the scheme. The Opposition expressed support for the legislation, although it did move some of our proposed amendments. The Greens expressed opposition and moved others. It is regrettable that the government accepted none of these amendments.

In *Ousley v The Queen*³ McHugh J said of provisions in the Commonwealth Crimes Act that make it mandatory for a police officer executing a search warrant to make a copy of it available to the occupier of the premises,

Such provisions reflect the desire to achieve an appropriate balance between a person's rights of privacy and the need to facilitate the gathering of evidence against, and the apprehension and conviction of, those who have broken the criminal law. Recognition is given to the importance of enabling persons whose rights of privacy stand to be affected to satisfy themselves of the authority for such action...

In *Ballis v Randall*⁴ Hall J set aside three search warrants executed covertly by NSW Crime Commission officers. He acknowledged that investigating officers might find covert search warrants highly desirable – even necessary – and observed that it could be inconvenient not to be able to execute a search warrant without the knowledge of the occupier. However, he went on to say:

[I]nconvenience in carrying out an object authorised by legislation is not a ground for eroding fundamental common law rights": *Plenty v Dillon* (1991) 171 CLR at 654 referred to by the Full Court of the High Court in *Coco v R* [1993-94] 179 CLR 427 at 436.

Yet, it appears that the NSW Parliament decided that inconvenience to the police should trump the right to privacy. And it did so despite the lack of any empirical evidence showing the need for these

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Premier Nathan Rees at a NSW Police briefing on violence related to outlaw motorcycle gangs, 23 March 2009. Photo: Tracey Nearmy / AAP Image

covert search warrants and without proper consideration of whether this legislation was a proportionate response to the concerns apparently raised by the police, presumably in the wake of the decision in *Ballis v Randall*.

The NSW Government appeared to share these concerns when covert warrant powers were originally proposed for terrorism-related offences in the *Terrorism Legislation (Warrants) Bill 2005*. The then attorney general, the Hon Bob Debus MP, noted at the time that:

General criminal activity has never aimed to perpetrate the mass taking of life, the widespread destruction of property, or the wholesale disruption of society in the way that terrorism does. The powers in the bill are not designed or intended to be used for general policing. Their use is restricted to the NSW Police Counter-Terrorism Co-ordination Command and to the units of the NSW Crime Commission assigned the task of investigating and responding to terrorism. Law enforcement agencies already have a wide array of investigation powers at their disposal and they will all continue to be employed in the fight against terrorism.⁵

When the government introduced its anti-terrorism legislation in 2005 it announced that the covert warrants scheme would be the subject of independent monitoring

by the ombudsman for two years. Although the ombudsman reported to the government, the government has not tabled his report. Why the legislation was introduced before the ombudsman's report is made public is a mystery.

Our experience with the covert search warrants legislation was replicated when the government introduced the Crimes (Criminal Organisations Control) Bill, only in this case there was even less time for debate. The Bill was introduced

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into the lower house on 2 April, passed through both houses that same day and commenced the following day. The Legislation Review Committee expressed its concerns that the Bill would criminalise a person's associations rather than 'a guilty act of a specified criminal conduct' and would deny a person's right to freedom of association, contrary to article 22 of the International Covenant on Civil and Political Rights. It pointed out that this legislation went further than its South

Australian prototype and compared it to the old consorting laws of the Askin government about which the Wran Labor government had been very critical.

During the brief window of opportunity available to it, the Bar Association again briefed parliamentarians on our concerns, which were of the same order as those later voiced by the Legislation Review Committee, but both the New South Wales Government and Opposition, keen to be seen to be doing something about outlaw motorcycle gangs, seemed to be unable to see the wider picture.

Fortunately, with the change of government federally, there has been much greater consultation with the profession about these sorts of issues. In September last year the association co-hosted (with the Law Council of Australia) a Federal Criminal Law Conference, which was designed to feed into a forum later in the month in Canberra organised by the minister for home affairs. A number of highly qualified members of the bar and bench from across the country attended and presented papers. The association also attended and contributed to the Canberra forum. The purpose of both events was

to generate ideas to improve the federal criminal law. In July this year the Australian Government released a discussion paper on proposed amendments to the national security legislation. The association is contributing to the Law Council's response and may lodge its own separate submission. It is a pity that the New South Wales Government is apparently unwilling to follow the example of its federal counterpart.

Some opponents of human rights legislation have argued that a scrutiny of bills committee is sufficient to protect our rights from ill-conceived parliamentary incursions. However, the NSW experience suggests otherwise. The NSW Legislation Review Committee's powers are limited to reporting to both houses of parliament on whether a bill complies with certain criteria related to rights or process. Parliament is entitled to pass a bill even though the committee has not reported on it. In the case of the Crimes (Criminal Organisations Control) Bill, the committee's report was published on 4 May 2009, over a month after the Bill passed through both houses. In the case of the covert search warrants legislation, although the committee did report before the Bill was passed, the government took no notice of what it had to say.

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In June the Bar Association complemented its work on such legislation by presenting a comprehensive submission to the National Human Rights Consultation. The association, like the Law Council of Australia and the Victorian Bar, recommended the enactment of national legislation providing for the protection of human rights contained in international covenants Australia has ratified. The NSW experience only serves to reinforce the wisdom of the Association's position.

I thank the criminal law and the human rights committees, and the Bar

Association's staff - Cindy Penrose and Alastair McConnachie - for their selfless efforts in helping the association to fulfil its role in promoting the administration of justice in the community by speaking out for the rights of all, no matter how little political mileage might be seen to be gained in doing so.

Barristers in schools

During the 2009 Law Week, the Bar Association launched its Barristers in Schools Programme. The programme involves sending barristers to primary schools to introduce children to the law and to barristers, at a time in their lives when they might come into contact with it but before their opinions and prejudices are formed. It was conceived as a way, not only to assist the community, but also

to combat some of the negative publicity that dogs the legal profession. It was an unqualified success. Years 5 and 6 students from four schools enthusiastically participated in the programme and the *Daily Telegraph* sent a journalist and a photographer to one of the schools to cover the story. We are awaiting advice from the Department of Education before taking it further. However, the department has been very supportive to date and I am optimistic that it will shortly approve the programme's expansion. Our thanks are due to Karen Conte-Mills, Margaret

Cunneen SC and Andrew Martin for preparing the curriculum and conducting the programme.

Depression

Our work to raise awareness about, and encourage early intervention to address depression and other mental health issues, continues. During the year I visited a number of chambers to seek the views of members and to introduce Penny Johnston, our director, care and assistance. The work that Penny has performed in the relatively short period she has been with us has been invaluable. She has not only responded swiftly to the needs of individual barristers on request but has organised bereavement counselling for chambers and staff and for families and she has played a valuable role in cushioning the blow of disciplinary action for those of our members whom the Bar Council anticipates may benefit from her assistance. We are enormously grateful to her.

A final word

Finally I must thank the indefatigable executive director and the entire Bar Association staff for their support throughout my term of office. Few appreciate the extent of their efforts on our behalf. We are greatly indebted to them all.

Endnotes

1. Hansard, NSW Legislative Council, Tuesday 24 March 2009
2. Legislation Review Digest No. 2 of 2009 p 41
3. (1997) 192 CLR 69 at 112
4. [2007] NSWSC 422
5. Hansard NSW Legislative Assembly, 9 June 2005, p 16940